HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 5596 /01 (M/S)

Smt. Mainawati and others.

Vs.

Rent Control Eviction officer & others

Approved for reporting .

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~~Not approved for reporting~~ Date of decision: 10.04.2006

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

WRIT PETITION NO. 5596 (MS) OF 2001

1. Smt. Mainawanti, W/o late Sri G.D. Khatak,
2. Smt. Champawati, W/o late Sri Shanker Kumar (daughter), R/o 82/2, Narishilp Mandir Marg, Dehradun.

.....Petitioners.

Versus

1. Rent Control and Eviction Officer, Dehradun.
2. Brhan Dutt Sinha, R/o G-232 Nehru Nagar Colony, Dharampur, Dehradun.
3. Jaswant Singh, R/o 81/45 old connaught place, Dehradun.
4. Prakash Chand Garg, R/o 35, Sewak Ashram Road, Dehradun. .....Respondents.

Hon'ble Rajesh Tandon, J

Heard Sri Gopal Narain, Advocate for the petitioner and Standing Counsel for the respondent no. 1.

By the present writ petition, the petitioner has prayed for a writ of certiorari quashing the order-dated 24.10.2001 (Annexure No. 5 to the writ petition).

Briefly stated, according to the case of the petitioner, husband of the petitioner no. 1 and the father of petitioner no. 2 Sri G.D. Khatak was the tenant since long time of disputed godown using for keeping the goods regarding contractor work. He died on 3rd January, 1992 leaving behind his widow Smt. Mainawanti and widow daughter Smt. Champawati with her son residing with him before death.

After the death of the tenant Sri G.D. Khatak, petitioner no.1 was using the godown for the same work along with her daughter petitioner no. 2 with his son.

According to the petitioners, respondent nos. 2 and 3 moved application before respondent no. 1 for allotment of disputed godown and pursuant to that application, an inquiry was conducted by Rent Control Inspector on the direction of respondent no.1 regarding vacancy of the disputed godown and submitted a report on 26.08.1998 specifically mentioning that the godown is being used by the S/o Smt. Champawati.

Petitioners received a notice from the office of the respondent no. 1 along with the application filed by the respondents no. 2 and 3 under Section 12 of the Act No. 13 of 1972.

After receiving the aforesaid notice, the petitioners filed their objections through Smt. Savita Khatak stating therein that after the death of Sri G.D. Khatak, his widow petitioner no.1 and widowed daughter with his son residing are using the disputed godown and the tenancy right is herited.

Petitioner has submitted that the respondent on 24.10.2001 by an exparte order declared the vacancy stating that the son of the petitioner no. 2 Sri Aksh Khatak is an unauthorized resident.

Section 16 of the U.P. Act No. 13 of 1972 is quoted below:-

"16. *Allotment and release of vacant building.-*

Subject to the provisions of the Act, the District Magistrate may by order.-

(a) require the landlor to let any building which is or has fallen vacant or is about to fall vacant, or a part of such building but not appurtenant land alone, to any person specified in the order (to be called an allotment order); or

(b) release the whole or any part of such building, or any land appurtenant therto, in favour of the landlord (to be called a release order):

[*Provided that in the case of a vacancy referred to in sub-section (4) of Section 12, the District Magistrate shall give an opportunity to the landlord or the tenant, as the case may be, of showing that the said section is not attracted to his case before making an order under Clause (a).]*

(2) No release order under Clause (b) of Sub-section (1) shall be made unless the District Magistrate is satisfied that the building or any part thereof or any land appurtenant thereto is bona fide required, either in its existing form or after demolition and new construction, by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade, calling or where the landlord is the trustee of a public charitable trust, for the objects of the trust, or that the building or any part thereof is in a dilapidated condition and is required for purposes of demolition and new construction, or that any land appurtenant to it is required by him for constructing one or more new buildings or for dividing it into several plots with a view to the sale thereof for purposes of construction of new buildings:

Provided that no application under this sub-section shall be entertained for the purposes of a charitable trust the objects of which provide for discrimination in respect of its beneficiaries on the ground of religion, caste or place of birth.

(3) The allotment order shall specify.-

(a) whether the building shall be used by the tenant for residential or non-residential purposes;

(b) in the case of business purposes, the names of proprietors or partners of the business;

(c) the date, which shall not be earlier than seven days after the date of the order, by which the landlord shall deliver possession to the allottee.

(d) such other particulars as may be prescribed.

(4) Where the allottee or the landlord has not been able to obtain possession of the building, allotted to him or, as the case may be, released in his favour, or any part thereof, [***] the District Magistrate, on an application of the allottee or the landlord, as the case may be, may by order evict or cause to be evicted any person named in the order as well as every other person claiming under him or found in occupation, and may for that purpose use or cause to be used such force as may be necessary and put or cause to be put the allottee or the landlord in possession of the building or part.

(5) (a) Where the landlord or any other person claiming to be a lawful occupant of the building or any part thereof comprised in the allotment or release order satisfies the District Magistrate that such order was not made in accordance with Clause (a) or Clause (b), as the case may be, of sub-section (1), the District Magistrate may review the order :

Provided that no application under this clause shall be entertained later than seven days after the eviction of such person.

(b) Where the District Magistrate on review under this sub-section sets aside or modified his order of allotment or release, he shall put or cause to be put the applicant, if already evicted back into possession of the building, and may for that

purpose use or cause to be used such force as may be necessary.

(6) If the District Magistrate finds an application given under sub-section (5) to be false or frivolous, he shall by order award to the allottee or the landlord, as the case may be, against the applicant special costs which shall not exceed five hundred rupees.

(7) Every order under this section shall [subject to any order made under Section 18], be final.

(8) the allottee shall, [subject to the provisions of sub-sections (5) and (9), and Section 18], be deemed to become tenant of the building from the date of allotment or, where he is unable to obtain possession by reason of a stay order or of any other person having occupied or continued to occupy the building, from the date on which he obtains possession.

(9) The District Magistrate shall, while making an order under Clause 9a) of sub-section (1), also require the allottee to pay to the landlord an advance, equivalent to.-

(a) where the building is situated in a hill municipality, one-half of the yearly presumptive rent;and

(b) in any other case, one month's presumptive rent, and on his failure to make or offer the payment within a week thereof, rescind the allotment order.

Explanation.-In this sub-section the expression 'presumptive rent' means an amount of rent which the District Magistrate prima facie considers reasonable having regard to the provisions of sub-sections (2) and (2-A) of Section 9, provided that such amount shall not be less than the amount of rent which was payable by the last tenant, if any.

(10) Nothing in sub-section (9) shall be construed to require the District Magistrate to take any evidence or hold any formal inquiry before fixing the presumptive rent of the building allotted, and the amount mentioned in the allotment order as presumptive rent shall be subject to any agreement in writing between the parties or to any subsequent determination of standard rent after formal inquiry under Section 9:

Provided that until the presumptive rent is so revised by agreement or by an order under Section 9, the tenant shall continue to be liable to pay rent according to the presumptive rent specified in the allotment order, so however, that any subsequent order under Section 9 shall relate back to the date of commencement of the tenancy.]"

In ***Achal Mishra Vs. Ram Shankar Singh reported in 2005 (1) 2005 (1) ARC Page 887*** it has been observed as under:-

"It is thus clear that an order notifying a vacancy which leads to the final order of allotment can be challenged in a proceeding taken to challenge the final order, as being an order which is preliminary step in the process of decision making is preliminary step in the process of decision making and in passing the final order. Hence, in a revision against the final order of allotment which is provided for by the Act, the order notifying the vacancy could be challenged. The decision in Ganpath

Roy's case which has disapproved the ratio of the decision in M/s Trilok Singh and Co., cannot be understood as laying down that the failure to challenge the order notifying the vacancy then and there, would result in the loss of right to the aggrieved person of challenging the notifying of vacancy itself, in a revision against the final order of allotment. It has only clarified that even the order notifying the vacancy could be immediately and independently challenged. The High court, in our view, has misunderstood the effect of the decision of this court in Ganpat Roy's case and has not kept in mind the general principles of law governing such a question as expounded by the Privy Council and by this Court. It is nobody's case that there is anything in the Act corresponding either to Section 97 or to Section 105 (2) of the Code of Civil Procedure, 1908 precluding a challenge in respect of an order which ultimately leads to the final order. We overrule the view taken by the Allahabad High Court in the present case and in Smt. Kunj Lata v. Xth Additional District Judge, Kanpur Nagar and others (supra) that in a revision against the final order, the order notifying the vacancy could not be challenged the order notifying the vacancy would preclude a successful challenge to the allotment order itself. In fact, the person aggrieved by the order notifying the vacancy can be said to have two options available. Either to challenge the order notifying the vacancy then and there by way of a writ petition or to make the statutory challenge after a final order of allotment has been made and if he is aggrieved even thereafter, to approach the High Court. It would really be a case of election of remedies."

However, in view of the observations made above, petitioners have alternative remedy of filing the revision under Section 18 of the U.P. Act No. 13 of 1972. However, it will be open for the petitioner to challenge the order after the order under Section 16 of the Act is passed. However, during this period, the petitioner shall not be evicted on the basis of interim order dated 3rd November, 2001.

Subject to the aforesaid, writ petition is disposed of on the ground of alternative remedy. No order as to costs.

(Rajesh Tandon, J.)

10.04.2006
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